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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 529

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

JOHN BURNS, ET AL.

No. 530

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

FRED LOLLIS, ET AL.

No. 531

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ARNOLD E. BRADSHAW, ET AL.

No. 532

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

PHILIP G. RUST, ET AL.

No. 533

UNITED STATES OF AMERICA, EX REL. TENNESSEE VALLEY AUTHORITY, *Petitioner,*

vs.

ABRAHAM COLE HYATT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS

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BRIEF FOR RESPONDENTS

Opinions Below

The opinion of the Circuit Court of Appeals (R. 124-133) is reported in 150 Fed. (2) 613. The Opinions of the District Court (R. 8-13) are not reported.

Jurisdiction

The judgments of the Circuit Court of Appeals were entered on July 21, 1945 (R. 133, 135-138, 140-142). The petition for a writ of certiorari was filed on October 19, 1945 and the Writ was granted on December 10, 1945. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

The question involved is whether Tennessee Valley Authority (hereafter called TVA) is authorized by law to condemn the Respondents' properties, which, conceded, it does not need for any purpose in the construction, operation or maintenance of the Fontana Dam or Reservoir, but which it seeks to acquire to convey to the Department of Interior for park purposes, and thus to settle TVA's liability to the State of North Carolina, to Swain County and to these Respondents, for flooding a highway.

Statute Involved

The Tennessee Valley Authority Act of 1933, with its several amendments (48 Stat. 58, 49 Stat. 1075, 53 Stat. 1083, 54 Stat. 611, 55 Stat. 599, 575—16 U. S. C. A., Chapter 12A), hereafter called "the Act", is quoted in full in R. 65-95.[1]

Statement

Prior to the hearing of these cases in the District Court the TVA had constructed the Fontana Dam and Reservoir in Swain County in Western North Carolina, near the To-

[1] See Appendix hereto for quotations of the sections of the Act deemed to be pertinent here.

nessee line, and the Reservoir was practically filled with water at that time (R. 23).

The Dam is about twenty miles westerly from Bryson City, North Carolina. The Reservoir lies immediately to the east of the Dam and occupies what was formerly the bed of the Little Tennessee River and the land immediately adjacent thereto.

Until the flooding of the Reservoir, following the completion of the Dam, a road, known as Highway 288, extended along and near the northerly side of the Little Tennessee River, from Bryson City westerly to a point near the present site of the Dam—a distance of about twenty miles as the crow flies and about forty or fifty miles along the road. Immediately to the north of Highway 288, and lying between that road and the Great Smoky Mountains National Park farther on the north, was an area of about 44,000 acres of land. Prior to the purchase by TVA of approximately 38,000 acres thereof (R. 24, F. of F. 34), the area had been inhabited by about 216 families; and Highway 288 had been the sole means of access to their properties.[1]

TVA acquired all of the property which it needed or sought for the construction, maintenance and operation of the Dam and the Reservoir without seeking any of the lands of these Respondents, except a small parcel owned by Respondent Welch, which, by agreement, has been eliminated from this proceeding.[2] However, when the Reservoir had been filled to capacity, Highway 288 was partially flooded.

At a point about one-half mile south of the Rust lands, Nolands Creek had intersected Highway 288. An excellent gravel road approximately paralleled Nolands Creek and

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[1] Petitioner's Br. 9, referring to R 16.

[2] See Map, Exhibit 3 at end of R., showing the area, but not the road.

was and now is the means of access to the properties in the Nolands Creek section.[3]

The lands of all of the Respondents except Welch (aggregating about 6,000 acres) are at distances varying from one-half mile to four miles from the high-water mark of the Reservoir (R. 23 & 24), and are within distances varying from five to eight miles westerly from Bryson City (R. 13 and F. of F. 24 at R. 24, also, see Map, Exhibit 3, at end of R.).

Instead of adopting one or the other of the usual methods of meeting its liability for flooding the Highway, i. e. by supplying a substitute road or by paying damages for the taking, TVA entered into a contract on July 30, 1943, with the State of North Carolina, the Department of the Interior of the United States, and with Swain County (R. 99-113), which embodies the plan for which approval is here sought.

The contract provides, *inter alia*, that TVA would indemnify the State of North Carolina against any claims which might be asserted against it for damage resulting from the flooding of Highway 288; that TVA would pay to Swain County, the sum of $400,000.00, with which to retire the outstanding bonds theretofore issued to finance the original construction of Highway 288; that North Carolina would contribute to TVA, $100,000.00 of the $400,000.00; and that TVA would acquire by purchase or condemnation the entire area of 44,000 acres, served by Highway 288 (except about 2,000 acres thereof owned by North Carolina Exploration Company),[4] and would convey that entire area to the Department of the Interior, to become a part of

[3] Again, see Map (Exhibit 3 at end of R.) showing Rust lands and Nolands Creek flowing into the Tuckasegee River, but again not showing the road; Also R. 24 (F. of F. 32).

[4] See Map (Exhibit 3 at end of R.) for the excepted tract, shown in white near the westerly extremity of the 44,000-acre area.

the Great Smoky Mountains National Park. The Contract then provided that when and if the funds therefor should be made available by Congressional appropriation, the Department of the Interior would construct a super-highway through the area from Bryson City to a point near the Dam (R. 106).

None of the Respondents were invited to participate in the negotiations which preceded the execution of the Contract described above; nor, of course, were any of them parties thereto.

TVA's estimate of the cost of replacing Highway 288 throughout the entire distance from Bryson City to Fontana Dam was $1,400,000.00 (R. 21, 41). If that sum had been expended and the substitute highway had been constructed, of course there would have been no further liability on TVA for flooding 288. Consequently, it is inaccurate to state, as on Page 6 of Petitioner's brief, that in order to estimate the aggregate cost incurred in the substitute-highway method, the value of the fee (estimated at $775,000.00) must be added to the $1,400,000.00. The accurate method of comparison would seem to be as follows: $1,400,000.00 is the estimate of the aggregate cost involved in the substitute-highway method. The estimates on the other hand were as follows: $775,000.00 would be the cost of the acquisition of all of the 44,000 acres (R. 65). To that figure must be added the payment required by the Contract to be made to Swain County ($300,000.00 net). The total estimated costs under the Contract plan would be $1,075,000.00. The expected saving, therefore, by following the proposed method rather than the substitute-highway method would have been $325,000.00. However, those calculations give no consideration whatever to the cost of the super-highway to be constructed by the Department of the Interior, at a cost estimated from $3,000,000 to $4,000,000.00 (R. top

42). Therefore, TVA's proposed plan will ultimately cost the Federal Government $1,075,000.00 plus a maximum of $4,000,000.00 or a minimum of $3,000,000, an aggregate of $5,075,000.00 or $4,075,000.00, as compared with $1,400,000.00, the cost involved in the substitute-highway method, the increased expenditure involved in Petitioner's plan actually being $3,675,000.00,[5] or at the least, $2,675,000.00.

As heretofore pointed out, the properties of the Respondents are located at distances varying from a half-mile to four miles from the high-water mark of the Reservoir (R. 23, 24) and from six to eight miles from Bryson City and none of them have any physical connection with either the Dam or the Reservoir, nor are they needed or sought for use in connection with the Dam or Reservoir. In fact the Petitioner concedes that its sole aim in seeking to condemn these properties is to obtain them for the Park, and thus to extinguish the Petitioner's liability for flooding. Petitioner stated in its brief in the Circuit Court of Appeals (pp. 8 and 9) that the proposed taking was solely for the purpose of discharging its legal obligations arising out of the construction of the project.

The respondents Welch and Burns have waived their respective rights to claim any damages from TVA, from the United States of America, from the State of North Carolina, or from Swain County, "on account of any impairment, interference, or injury" to their respective properties resulting from the flooding of Highway 288. The

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[5] The testimony indicated that the estimated cost of the purchase of property of the North Carolina Mining Company was $50,000.00 (R.). The TVA has heretofore paid $250,000.00 for the easements acquired from the North Carolina Exploration Company (See Contract, R. 113), and it is agreed that approximately 1900 acres shall continue to be the property of the Exploration Company indefinitely. The record does not indicate whether the $250,000.00 paid to the Exploration Company is included in the total estimated cost of the entire area, $775,000.00.

have agreed, in their respective answers herein, to file formal waivers to that effect.[6]

The Rust lands (approximately 4,500 acres of the 6,000 acres, more or less, here sought to be condemned) adjoin the Great Smoky Mountains National Park. They are located at distances varying from one-half mile to four miles from the high-water mark of the Reservoir. Nolands Creek flows southerly from the Park through those lands and into the Tuckasegee River (See Map, Exhibit 3 at end of R.). Several families reside in the Nolands Creek settlement, and travel to and from their homes on a modern road which parallels the Creek and extends to Highway 288 (Map, Exhibit 3 at end of R.). Parts of the Rust land have been improved by private roads and modern residences. They have been piped with running water, and are equipped with electricity generated by Rust's power plant. The property has been used extensively for the growing of timber (R. 23, 24).

The land of the several other Respondents is used chiefly for farming (R. 23 & 24).

After TVA had *purchased* approximately 38,000 acres in the 44,000-acre area (i. e. practically all of the land westerly from Nolands Creek to Deal's Gap) (R. 24) (also see Map, Exhibit 3 at end of R.), it sought to condemn the lands of these Respondents. (Pet. Brief 9, and R. pages there cited.) It will be seen that all of the properties here involved lie within the watersheds of Nolands Creek, i. e. at distances of from six to eight miles from Bryson City (R. 13, 24). The Respondent Welch having released his right to demand a substitute highway and/or damages for the loss of Highway 288, a road of approximately only five to eight miles in length is required to serve the lands of all the other

[6] This is provided in both the Welch and Burns judgments in their respective cases (See R. 1, 2 and 3).

Respondents herein (R. 13, also see Map, Exhibit 3 at end of R.). The estimated cost of such a substitute road is $40,000.00 to $50,000.00 (R. 13).

Each of the Respondents moved for dismissal of the petitions seeking condemnation of his property, on the ground that there exists no legal basis or authority for such condemnation, since no part of any of the land of the Respondents or the material thereon was, or is needed or sought for any use authorized by the TVA Act.

After hearing testimony and arguments and after receiving the Briefs of the respective parties, the District Court dismissed the condemnation petitions; and its decision was unanimously affirmed by the Fourth Circuit Court of Appeals (150 F. (2) 613, R. 124-133).

Comments on Petitioner's Statement of Question Presented

The petitioner has stated the "Question Presented," as follows:

> "Whether, when respondents' easements of access have been taken and destroyed by the Tennessee Valley Authority's permanent flooding of the only highway serving their properties, a court can set aside the determination of the Board of Directors of the Authority, made in good faith and after a careful evaluation of all available alternatives, that the taking of the fee in respondents' properties is necessary to carry out the provisions and purposes of the Tennessee Valley Authority Act."

The fundamental question involved in this case actually is whether TVA is authorized by the Act to condemn the Respondents' properties, which, concededly (Petitioner's Brief 7 and 8; R. 34, 35, 24, 97), it neither needs nor seeks for use in the construction, operation or maintenance of the Dam or Reservoir. Admittedly, those lands have no physical connection with either the Dam or the Reser-

voir, and, if they should be condemned, TVA freely states that these lands will be conveyed to the Department of the Interior to become a part of the Park, as a means of satisfying TVA's liability for flooding the road. (Petitioner's Brief 7 and 8, referring to R. 101-103, 110-111, 63, 103-105.)

The question stated by Petitioner, as *quoted* above, though perhaps incidental to the fundamental issue herein, is material only insofar as it may be said to bear upon the primary question of TVA's authority to condemn the Respondents' properties.

Moreover, in passing, perhaps it should be observed that, whatever may be said about the good intentions or honesty of purpose on the part of TVA's Board of Directors in resolving that Respondents' lands are "necessary for carrying out the purposes of the Act," such motive cannot accurately be described as good faith or proper exercise of discretion in the more technical sense in which those terms have been defined by the Courts in cases similar to the instant one.

To state the fundamental question herein to be whether the "good-faith" decision of TVA to condemn the lands, can or cannot be reviewed by this Court, serves, at the outset of the argument only to confuse the real issue. Obviously, the basic question in the case may be simply stated: Whether the Petitioner is authorized by law to condemn the Respondents' lands.

Introductory Comments on Petitioner's Specification of Errors

The Petitioner has listed eight particulars in which it contends the Court below to have erred (Petitioner's Brief, 10 and 11).

There is little distinction, if any, between the Specifications numbered 1 and 2, respectively. Each challenges the

soundness of the decision below on the fundamental question in these proceedings, viz., whether TVA is authorized to condemn the Respondents' properties.

Specification 3 charges the Courts below with having exercised the prerogative of TVA, i.e., with having determined the "*necessity*" for the taking of Respondents' lands. We believe that a rather casual examination of the Opinion below on this phase of the case will disclose that the lower Court determined, not whether these properties are *necessary* for the Fontana project *proper*—TVA concedes that they are not thus needed—but that the Court passed only upon the question whether the proposed use is a "public use" (R. 129-132). More will be said on this question when the subject of "public use" is discussed *infra*.

On the same tone as in Specification 3, Petitioner charges in Specification 4 that the Court below held that "Petitioner cannot legally condemn a fee interest in lands when, in the opinion of the Court, an easement would be sufficient to meet its requirements." Again, a mere glance at the opinion below will perhaps be sufficient to show clearly that the lower Court made no such determination as is here charged. Again, we say, TVA has conceded that no more than the easement is *required* for any of the purposes of the Fontana project *proper*, and that the fee is sought solely for the purposes of meeting the liability for the taking of the easement and to provide additional lands for the Park (R. 126, 129).

As was observed, in connection with Petitioner's statement of the "Question Presented," it will be seen that again in Specifications of Error 5, Petitioner confuses the factual question of the presence or absence of proper motives with the legal question whether *authority exists* for the action proposed. If the term, "good faith," is intended to be used in Specification 5 as it was doubtless

intended to be used by the District Court in one place among its Findings of Facts (R. 14), i.e., to mean with proper motives, we cannot deny that TVA's Board acted in good faith in resolving to take Respondents' lands. But, obviously, the existence of proper motives or good intentions cannot justify action beyond the limits of one's authority. Consequently, it begs the question for Petitioner to assert, as in Specification 5, that the Court below erred when it substituted its determination for that of TVA's Board "*made in good faith*," and when it decided that Petitioner had no legal authority to condemn Respondents' lands.

In Specification 6, Petitioner has again misinterpreted the decision below. It was not there held that Respondents' lands are sought *solely* for the purpose of transferring them to the Park Service. The Court did hold, however, that such was one of the purposes; and that has been consistently conceded by Petitioner throughout this proceeding (Petitioner's Brief 7 and 8, referring to R. 101-103, 110-111, 63, 103-105).

Specification 7 raises a true issue of law, which is discussed at some length *infra* (Pp. 15-33).

Specification 8 appears to be a contention that if a condemning body takes a road which is the only means of access to privately owned lands and thus renders the lands of little if any value, it may, if it chooses, take all of such lands against the owners' wishes, without limit, and without regard to the use to be made of such lands, provided only that compensation be paid to the owners. Discussion of this contention will also be found *infra* (Pp. 47-49).

Reply to Petitioner's Introductory Argument

When TVA found that its project would flood parts of Highway 288, it evidently gave at least some slight con-

sideration to the customary and the recognized methods of meeting its responsibility therefor. The usual alternatives and the only methods for which any precedent has heretofore existed are (1) the payment of money damages for the loss of the road, or (2) the furnishing of a substitute road therefor. Perhaps, as TVA contends, alternative (1) seemed impracticable, particularly when the entire area (44,000 acres) was under consideration, because parts of it would have been without any means of access after the flooding of Highway 288.

The construction of a substitute Highway is, of course, the method usually followed under such circumstances. In its Statement, and again in its Argument, Introductory, Petitioner stresses the cost of a substitute road.

In the Statement, *supra*, P. 2, calculations have been made to show the comparative costs of TVA's proposal and the substitute-road method, according to the testimony of Petitioner's witnesses. This Court and others have repeatedly held that "excess taking" cannot be justified legally for reasons of profit or even of economy. If, however, the Court should see fit to go into the question of the relative costs and should be influenced thereby, it will undoubtedly find, from the Record, that TVA's proposal will ultimately cost the Government of the United States millions more than the cost of the substitute road (*Supra*, P. 2, and R. top 42).

Furthermore, of course, the cost figures quoted by Petitioner involved the construction of a road to serve the entire area of 44,000 acres, i.e., from Bryson City to Fontana Dam; 38,000 acres thereof, including all of the land westerly from Nolands Creek (except Welch's and lands of North Carolina Exploration Company—not in this proceeding), had been purchased prior to the hearings herein in the District Court (R. 24); consequently, in weighing the practicalities in this case, no substitute road except

one from Nolands Creek to Bryson City need be considered (R. 24, F. of F. 35).

The 4-party Contract provides that the North Carolina Exploration Company, owner of about 1950 acres in the 44,000-acre area, may retain all of its property (R. 102). That Contract further provides for the construction of three roads as means of access to the Exploration Company's property from three different directions (R. 106 (a), (b), (c) and (d)).

It is true that the Record contains some *hearsay* evidence regarding the "informal" advice from the War Production Board that it would not furnish the necessary priorities for the construction of a substitute road for the entire distance of about 50 miles (R. 48, 53-54, 63, 100). It surely seems that more reliable proof should have been adduced in support of that contention, since so much reliance is now placed upon it by Petitioner. One would think that the need for the Fontana project to meet necessities of the war would surely have justified granting the priorities necessary to meet all legal obligations directly involved. Whatever weight may properly be given to the evidence produced, regarding the War Production Board's attitude, there is absolutely no evidence in the record to show that the War Production Board would have refused, or that any successor that it may now or hereafter have, will refuse to release sufficient labor and materials to construct the road for a distance of from five to eight miles. It is not surprising that Petitioner's quotation of the District Court's finding on this subject has been relegated to a footnote (Petitioner's Brief 5), particularly when it appears so clearly from the finding, how different the finding actually is, when analyzed, from the Petitioner's contention on this subject.

We will pause only very briefly to reply to the five accomplishments alleged (on Page 15 of Petitioner's Brief)

to have been attained by TVA through its plan. Perhaps it will suffice to say that the ultimate expenditure of four or five millions of dollars of Federal funds, primarily for the pleasure and benefit of North Carolina, Swain County, and the property-owners who wanted to sell, or who sold their lands to TVA, was, or will be pleasing to the recipients of those pleasures and benefits. If it will not be presumptive for us to do so, we suggest that, particularly in these times, a more economical course would have been more appropriate. However, this Court will doubtless be more interested in, and will, of course, be guided by the principles of *law* rather than by the views of any of us regarding the practicalities, the expediency, or even the desirability of one course as compared with the other.

Summary of Argument

All of the contentions made in this proceeding seem to us to relate to two principal arguments, viz.:

I

The Question Whether the Use to Be Made of Land Proposed to Be Condemned Is One for Which the Condemnor May Properly Exercise the Power of Eminent Domain Is a JUDICIAL QUESTION; *or, to State This in Another Way, the Court May Review Such a Question, and May Determine Whether Such Use Is a* "PUBLIC USE".

II

Nowhere in the Act Nor Among the Precedents Is There Authority for TVA to Condemn Private Properties for the Use or Purpose Here Proposed.

I

The question, whether the use to be made of land proposed to be condemned is one for which the condemnor may properly exercise the power of eminent domain, is a judicial question.

When a public authority seeks to condemn private property, two questions may arise: (1) Whether the property is sought for a *purpose* or a *use* for which the law authorizes condemnation; and (2) Whether the particular property is *necessary* for the fulfillment of that purpose. If the purpose or the use for which the property is to be taken be one for which the law authorizes condemnation of private property, such purpose or use is designated by the Courts as a "public purpose" or "a public use". Those terms have almost uniformly been used in a somewhat limited or technical sense. They have not been accorded broad or literal meanings. As has been pointed out by the Courts,[7] these terms are not used in the sense of public utility, public interest, common benefit or general advantage or convenience, nor synonymously with the more indefinite terms, "public improvement". They are used as a brief way of saying, a use or a purpose authorized by the particular statute under consideration.

When private property is sought to be taken against the will of the owner, if the law should preclude the Judiciary from inquiring whether the use for which such property is sought or whether the purpose for which it is intended to be used is a public use, then a condemnor, merely by resolution, could preclude the courts from inquiring whether the

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[7] *City of Richmond* v. *Carneal* (Supreme Court of App. of Va.), 129 Va. 388, 106 S. E. 403; also Opinion below in instant case, R. 131 and cases there cited.

proposed use is one for which the Statute authorizes condemnation.[8]

It is equally well settled that, if the purpose or the use for which the property is sought be a "public purpose" or a "public use", the question of the *necessity* of the particular property or the *extent* to which property should be taken for such purpose or use, is a *legislative* question, and, when determined by a legislature, or by an agency created for that purpose, is not subject to judicial review.[9]

The two rules were tersely stated in *U. S. v. Vogel*, 28 Fed. Supp. 454, 455 (Dist. Ct. W. D. of Ky., 1939), as follows:

> "It is well settled that while the question whether the purpose of a taking is a public one is judicial — * * * the necessity and the proper extent of a taking is a legislative question."

If, in the instant case, the lands of the Respondents were sought as a site for the dam or even as a source of materials to be used in the construction, as in *Bragg* v. *Weaver*, 251 U. S. 57, or in the maintenance of the dam, the use or purpose would be a public one; and, in the absence of bad faith or clear abuse of discretion, the determination by TVA of the *necessity* of the lands for those purposes would not be subject to judicial review.

However, TVA now concedes that these properties are not sought for any such purpose or use, but to the contrary, that, if acquired, they are to be conveyed to the Department of the Interior for park purposes, as a means of satisfying the liability for destroying Highway 288. Whether such a

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[8] *Rindge Co.* v. *County of Los Angeles*, 262 U. S. 705; *City of Cincinnati* v. *Vester*, 281 U. S. 439, 446.

[9] *Rindge Co.* v. *Los Angeles County*, 262 U. S. 700, 709; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Shoemaker* v. *U. S.*, 147 U. S. 282; 18 Am. Jur. 734, 737.

purpose or use is one for which the Act authorizes the condemnation of private property is clearly a judicial question. The recital in the reslution passed by the TVA Board of Directors, that the lands are necessary for the carrying out of the *purposes* of the Act, *cannot* and *does not* preclude the Court from examining that question.

The case of *City of Cincinnati* v. *Vester, et al.*, 281 U. S. 439, was decided in 1930. A reading of the opinion of Mr. Chief Justice Hughes in that case discloses that the facts and the contentions of the City there were rather strikingly similar, in many respects, to those in the instant case. The question there presented was whether the City of Cincinnati was authorized by law to condemn certain portions of the properties of the Respondents in connection with the widening of a street. An incidental question there, as here, was whether the Court could properly review a determination by the City Council of the propriety of the proposed taking. The Council's determination had been evidenced by an ordinance, quite similar to TVA's resolution here.

The resolution (presumably a preamble to the Council's resolution) declared the intention of the City to appropriate a strip of land twenty-five feet in width immediately adjacent to the street to be widened, and no question was raised concerning the validity of the condemnation of that strip. The controversy related to the proposed condemnation of three lots of land, in addition to the twenty-five foot strip, lying between the street as widened and other nearby streets. That proposed condemnation was referred to as the "excess condemnation".

The Constitution of Ohio provided substantially that a municipality might condemn for public use or in furtherance of a public use, property appropriate therefor. It further provided that a municipality might acquire an excess over that actually to be occupied by the improve-

ment and might sell such excess with such restrictions as might be appropriate to preserve the improvement made."[10]

A statute of Ohio provided that when it was deemed necessary to appropriate property, the City Council should pass a resolution declaring such intent and defining the purpose of the appropriation. The statute also provided that, for the purpose of creating reservoirs to supply water, "the council might appropriate such property as *it may determine to be necessary*". (Emphasis supplied.)

The TVA Act (Sec. 4(h)), authorizes TVA "* * * to exercise the right of eminent domain * * *", and provides that all real estate thus acquired "* * * shall be entrusted to the Corporation * * * to accomplish the purposes of this act * * *." The TVA Act also provides (Sec. 4(i)) that "* * * the corporation may proceed to exercise the right of eminent domain, and to *condemn all property that it deems necessary for carrying out the purposes of this Act*, * * *." (Emphasis supplied.) The similarity between the provisions of the Ohio statute in the *Cincinnati* case and those of the Act in the instant one is apparent.

The resolution of the Cincinnati City Council stated the purpose of the proposed "excess condemnation" as being "*in furtherance of the said widening of Fifth Street*", and "*necessary for the complete enjoyment and preservation of said public use.*" The ordinance also declared the proposed condemnation to be "*for the more complete enjoyment and preservation of the benefits to accrue from said*

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[10] The portion of the Ohio Constitutional provision paraphrased above reads as follows:

> "A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. * * *."

public use." (Emphasis supplied.) Again, the striking similarity between the language of that ordinance, on the one hand, and the contentions of the Petitioner with respect to the public and sociological benefits to be attained through the condemnation of Respondents' lands, is, we think, rather significant (Petitioner's Brief 18).

In the *Cincinnati* case, the City argued that in resorting to excess condemnation, legislative bodies generally have had in view the following three purposes: "(1) the avoidance of remnant lots, (2) the preservation and amplification of the improvement, and (3) the *recoupment of expense* from increased values."—not unlike Petitioner's arguments in this proceeding. (Emphasis supplied.)

At this point, perhaps attention should be called to the fact that the provision of the Constitution of Ohio, quoted in Footnote 10 herein, expressly authorized the City to "appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made." The difference between that Constitutional provision and the more limited authority granted to TVA, in Section 31 of the Act (R. 95), relied upon so heavily by the Petitioner here, is likewise significant.[11]

It would seem that in the *Cincinnati* case, with *express constitutional* authority for condemnation of excess property, the City was on a much firmer foundation, in its

[11] Nowhere does the TVA Act *expressly* authorize the Petitioner to condemn more land than is actually needed for the construction, operation or maintenance of its projects. Section 31 of the Act, by implication or by inference, perhaps can be said to show that Congress contemplated that on some occasions TVA might find it convenient to "*purchase*" what one of the Reports of the House Committee which made recommendations with respect to the Amendment of 1935 (Section 31 of the Act) described as "little peninsulas". (See Appendix hereto, Page 57). This will be discussed under Argument II, *infra*.

attempt to recoup expense by the excess taking there, that is the Petitioner in the instant case, with neither constitutional nor statutory authority for any such excess taking as is proposed here.

As above stated, one of the primary questions in the *Cincinnati* case, was whether the Court could properly review the determination made by the City Council. In that connection, Mr. Chief Justice Hughes made this statement (281 U. S. 446):

> "It is well established that in considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one. In deciding such a question, the court has appropriate regard to the diversity of local conditions and considers with great respect legislative declarations and in particular the judgments of state courts as to the uses considered to be public in the light of local exigencies. But the question remains a judicial one which this court must decide in performing its duty of enforcing the provisions of the Federal Constitution."

In passing upon the question of the effect of the City ordinance, the Court used this language (281 U. S. 447):

> "* * * Under the provision of the Constitution of Ohio for excess condemnation when a city acquires property for public use, it would seem to be clear that a mere statement by the council that the excess condemnation is in furtherance of such use would not be conclusive. Otherwise, the taking of any land in excess condemnation, although in reality wholly unrelated to the immediate improvement, would be sustained on a bare recital."

The Court held that the condemnation of the lots (the "excess taking") was not authorized by law.

Finally, in the opinion of the Court, in the *Cincinnati* case, which expressed a unanimous decision, we find the following statement with regard to the question of the ultimate use to be made of the "excess property":

> "It is not enough that property may be devoted hereafter to a public use for which there could have been an appropriate condemnation."

Petitioner contends that the Court below, while giving lip service to the well-settled principle that the *necessity* of a particular taking for *public use is a legislative* and not a *judicial* question, departed from that rule when it decided that the taking of Respondents' lands would be "excess condemnation"[12] Petitioner charges that in so doing, the Court below ignored the decisions of this Court and of other tribunals.[13] The case at the top of Petitioner's list at that point in its brief is one upon which it also leaned heavily in the Court below, *Old Dominion Land Co.* v. *United States*, 296 Federal 20 (C. C. A., 4th, 1924), Aff'd. 269 U. S. 55, 70 L. Ed. 162. Although Petitioner has not seen fit, in its Brief, to discuss that case even casually, perhaps we should give some attention to it, since both here and below it tops Petitioner's list.

During World War I, the Government had leased certain lands in Newport News, Virginia, from the Old Dominion Land Company for a period of one year. The lease contained a provision authorizing its renewal for the period of the War and for the time necessary for the return of our troops from Europe. It also provided that all buildings and improvements erected by the Government on the lands leased should remain the property of the Government, with the right of removal during the lease or during

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[12] Petitioner's Brief 41.

[13] Petitioner's Brief 42, citing several cases.

the period of its renewal and within thirty days of the expiration of the term of the last renewal. The Government constructed Quartermaster Warehouses and other improvements on the property as an Army Supply Base, at a cost of $1,522,000.00. The Land Company refused to renew the lease after June 30, 1922, and gave notice that it would hold the Government to its contract-period of thirty days thereafter within which to remove the warehouses. The Secretary of War was unsuccessful in his attempt to agree with the Land Company on a price to be paid by the latter for the improvements to be left on the land, and condemnation proceedings were instituted, pursuant to the authority vested in the Secretary of War by *express* provisions of a statute.

It was contended on the part of the Land Company that the Government was attempting to condemn land in order to recoup the value of the improvements placed thereon and that it had no intention of using the land for any public purpose. In answer to the landowners' contention, the Circuit Court said (296 Fed. 22):

> "The Court cannot deny the truth or good faith of *express declaration in the Statute* that the property is to be taken for the plainly public use of Quartermaster Warehouses." (Emphasis supplied.)

The United States was in possession of the Old Dominion Land Company's property sought to be condemned and was using it for the purposes above stated.

The question of excess taking was not even discussed in the opinion. Nothing in the opinion militates against the fundamental principles announced and adhered to by all of the Courts, prohibiting the condemnation of property in excess of that expressly authorized by law.

If it can possibly be said that the decision of the United States Supreme Court, in the *Old Dominion* case, is in any

respect contrary to the later decision of the same Court in *City of Cincinnati* v. *Vester*, 281 U. S. 439, 74 L. Ed. 950 (1930), *supra*, it is, of course, proper to say that, to such extent, the *Old Dominion* case has been overruled by *Cincinnati* v. *Vester*. However, we believe that this Court will find that the facts in the *Old Dominion* case are clearly distinguishable from those in the *Cincinnati* case and from those in the case at bar. In the *Old Dominion* case, as was explained in the opinion of the Court, delivered by Mr. Justice Holmes (269 U. S., pp. 63, 64 and 65), a statute, passed by Congress in 1919, had stopped the purchase of land for military purposes generally. However, amendments thereto had *specifically appropriated funds for the acquisition of these particular lands*, then under lease. The opinion of Justice Holmes, on the effect of the exception contained in the amendment, is in part as follows:

> "It is argued that the general purpose of this exception to the stopping of expenditures was only to carry out agreements by which the Government already was bound: and that the specific appropriations were made only in case the property mentioned was the object of such previous agreement. No doubt the general purpose was that suggested, but the rest of the Act showed that the appropriation was not confined to that alone, and the *specific unqualified mention of the land in question as land of which the acquisition was to be completed overrides the general statement, however much confirmed by citations from the congressional debates.*" (Emphasis ours.)

It will be seen from a careful reading of the opinion in the *Old Dominion Land Company* case that, as Judge Parker pointed out below, that that decision was based upon the ground that "Courts must accept the purpose of the acquisition of the property as declared in the Act of Congress under which it was condemned."

The Deficiencies Appropriation Act, pursuant to which the property was condemned in the *Old Dominion* case, not only stated the acquisition of the property in question to be for a "public use", but that Act described one of the purposes for which the appropriation was made and for which condemnation was authorized when the property could not be purchased, thus:

> "Sites for military purposes: For completion of acquisition of real estate as authorized by" (here reference is made to a former Appropriations Act) "For quartermaster warehouses, Newport News, Virginia, $223,670.

Furthermore, of course, quartermaster warehouses clearly serve "military purposes."

Perhaps if the use to be made of the lands sought in the case at bar was even remotely related to the purposes for which TVA was created and for which it was expressly authorized to acquire real estate, or, if, as in the *Old Dominion* case, the Act expressly appropriated funds for, or specifically provided for the acquisition of the lands here under consideration, there would be an analogy between the *Old Dominion* case and the instant one.

As is true of the *Dominion Land Company* case, immediately *supra*, an examination of the facts and the decisions in each of the several other cases cited by Petitioner[14] (in connection with its contention that the lower Court trespassed upon TVA's prerogative) will demonstrate clearly the *factual* distinction between each of those cases and the case now before the Court. In our "Brief in Opposition" to the application for certiorari, we analyzed each of those same ten cases, except *Coggeshall* v. *United States*, 95 F. (2) 986, which we will now discuss.

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[14] Petitioner's Brief 42.

Coggeshall v. *United States*, mentioned immediately above, is the only one of the ten cases cited at the top of Page 42 of Petitioner's Brief which was not cited in support of the application for certiorari and was, consequently, not discussed in our Brief in Opposition. In that case, the landowner had granted to the United States an option to purchase his land in South Carolina. The option contract provided in substance that in case the title should be unsatisfactory, condemnation proceedings might be instituted. The title proved unsatisfactory, and the appellant was notified that a suit to condemn would be filed. That was done, evidence was taken regarding the value of the lands, and an award was made. Thereafter, the appellant petitioned the Court to set the entire transaction aside on several grounds, one of which was that the Government had no Constitutional right to take the lands, because no navigable stream had been involved. The Fourth Circuit Court of Appeals held that the determination of the question involved was within the discretion of the District Court, and that that Court's determination would not be set aside in the absence of clear proof of abuse of discretion. The Circuit Court pointed out, in its opinion (Page 989), that no evidence had been presented on the question whether a navigable stream had been involved, or whether the land in question was actually necessary for the purpose for which it was sought. It was further held that because the appellant had made no opposition to the entry of the order on the award and had taken no exception to anything done in the suit the judgment of the lower Court would not be disturbed. The decision was based solely on the rule that the matter was within the discretion of the trial Judge and that there was nothing in the record to justify the Court of Appeals in holding that the discretion had been abused (Page 990).

That case is obviously not analogous to the instant one.

United States v. *Meyer*, 113 F. (2) 387 (C. C. A. 7), cert. denied 311 U. S. 706, was discussed at considerable length in our Brief in Opposition,[15] and the remaining eight cases cited on Page 42 of Petitioner's Brief here, were also digested in our Opposition Brief. We believe that this Court will find that each of those cases is clearly distinguishable from the instant one.[16]

Petitioner contends that the use to be made of Respondents' land is for "reservoir purposes."[17] In support of that assertion, Petitioner refers back to prior pages in its Brief wherein, among others, is found this statement[18]:

> "A large reservoir project may flood many square miles of land, inundating highways and railroads, water and sewage mains, power lines and other utility facilities, courthouses, schools, and even whole towns or villages."

Although some reservoirs may flood some or even all of the several types of properties enumerated above, in the case now under consideration, Petitioner agrees—we understand—that no part of the lands here in question have been, or are to be flooded by the reservoir.[19] Its high-water mark is at least one-half mile distant from the nearest boundary of the nearest of these properties. Moreover, as Judge Parker put it, it is not proposed "to take stone or timber" from these properties or to use them "for any of the purposes for which the TVA had been created." All of these lands, if condemned, would be conveyed to the Park Service. Certainly, it would be a severe strain upon that term to attempt to denominate the use

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[15] Brief for Respondents in Opposition 7-11.

[16] Brief for Respondents in Opposition 15-21. The *Meyer* case is also discussed *infra*, p. 47.

[17] Petitioner's Brief 42.

[18] Petitioner's Brief 26.

[19] Pet's. Br., p. 9.

proposed to be made of these lands as "reservoir purposes."

Brown v. *United States*, 263 U. S. 78, and *Dohany* v. *Rogers*, 281 U. S. 362, are said by Petitioner to involve situations similar to the one before us here, and, therefore, to be controlling.

In *Brown* v. *U. S.*, on which substantial reliance was placed by the Petitioner in the Court below as well as herein,[20] the facts were briefly as follows:

The damming of the Snake River flooded three-fourths of the town of American Falls, Idaho. The Act of Congress there *specifically authorized the condemnation of sufficient land for a new town-site, to replace the flooded portion*, also expressly provided for the removal of the buildings to the new site, and finally, for the sale of any lots remaining in the area condemned, not used in exchange for the flooded lands. Brown opposed the condemnation, contending that, the object being to condemn his land for exchange and or sale to another, it was not for a "public use," but was unconstitutional. This Court, in affirming the decision below, pointed out that the town was an important one for its section; that three-fourths of its streets, alleys and parks would have to be abandoned, as would all of the buildings (private and public) in the portion to be flooded unless they could be moved to new locations nearby, and that because of the topography of the land, they could be moved only to the gradually rising ground east of Snake River; that the land sought to be condemned was the only available place to which the flooded part of the town could be moved practicably so as to be united with the one-quarter remaining; and that the acquisition of the new town-site was expressly authorized by the Act and was a natural and proper part of the construction of the dam and reser-

[20] Petitioner's Brief beginning on Page 29, also on Page 36.

voir, to make provision for a substitute town as near as possible to the old one.

The opinion of Chief Justice Taft was in part as follows:

> "A method of compensation by substitution would seem to be the best means of making the parties whole. The power of condemnation is necessary to such a substitution" (263 U. S. 83).

It will be borne in mind that in the *Brown* case Congress had specifically authorized the lands in question to be condemned for the purposes for which they were condemned. The condemnation there would be comparable to a condemnation here of sufficient of the lands of the Appellees to replace Highway 288, as more fully appears from our reference to the *Feltz* case immediately *infra*.

In the case of *Feltz* v. *Central Nebraska Public Power and Irrigation District*, 124 Fed. (2) 578 (C. C. A., 8th, 1942), the facts were as follows:

The Power Company, given the right of eminent domain by appropriate legislation, while in the construction of a dam and reservoir on the North Platte River in the State of Nebraska, flooded U. S. Highway 26. The Power Company recognized its duty to relocate the highway and thereupon instituted this action to condemn a new right of way over the lands of Feltz in lieu of Highway No. 26, which would be submerged.

The landowner Feltz took the position that the Federal District Court had no jurisdiction to entertain the condemnation because the lands were not required for the dam site or for the reservoir of the project, but were required only for the new relocated United States Highway No. 26, agreed to be substituted for old United States Highway No. 26, taken for the project.

In disposing of Feltz's appeal, the Court said (p. 582):

> "It must be conceded that there are situations in which an attempted taking of land may be too remote from the scope of an authorized improvement to be sustained. But in this case we think it resulted from the public interests involved in the maintenance of the public highway as a part of the Highway System of the United States and the public interest in the development of the power and irrigation improvement that the work of highway relocation aided and contributed in a secondary way and was 'accessory' and 'in conjunction with' the District's improvement and the District's power to condemn must be sustained under the decisions of the Supreme Court in *Brown* v. *United States*, 263 U. S."

We have an example here of what Mr. Chief Justice Taft referred to in the *Brown* case, *supra*, as "substituted compensation".

TVA's argument is that the condemnation of the 44,000 acres of land, and, in particular, the lands of these Respondents, is so closely related to the construction of the Fontana Dam as to be accessory and incidental thereto. Because the construction of the dam is an authorized function of TVA, it is argued, any act of eminent domain which tends to serve that function is bound up with the construction of the same and acquires validity and sanction from that relationship. It is apparent that the proposed condemnation in the instant case is extremely remote from the legitimate function of TVA.

Reasoning from the premise that condemnation by extinguishment of the area in question is sufficiently close to the principal project to be an integral part thereof (and, therefore, valid), TVA, in the instant case, proposes to build an entirely novel proposition in the law. Its argument, pursued to a finality, is that the Constitution imposes upon

it the obligation to compensate the Respondents; that circumstances make it impossible to relocate the highway, ergo, since the obligation must be discharged somehow, the land which the road would serve, namely, the 44,000 acres, including the Respondents' lands, should be, itself, condemned, so that the obligation to relocate can no longer exist.

In this connection, it is important to remember that substituted compensation is, as the name suggests, simply an alternative to money damages. The original method of compensation, in eminent domain, was the payment of money damages, and any other form of compensation was considered improper. Thus, in *Nichols on Eminent Domain*, Second Edition, Volume 1, Section 205, page 625, the following comment is made:

> "If a definite taking has been actually made * * * the condemning party cannot mitigate the damages by offering to * * * build something for the owner to replace a convenience that he has lost."

And, in *Lewis on Eminent Domain*, Third Edition, Volume 2, Section 756, the following appears:

> "The commissioners or other tribunal to assess damages have no authority to give compensation in anything but money."

Upon that original doctrine of compensation in money, Chief Justice Taft granted the exception in the *Brooks* case, *supra*, describing it as "compensation by substitution". It must be borne in mind that it is the condemnor who has the choice of furnishing either method of compensation, to-wit: money damages or compensation by substitution. It must likewise be borne in mind that the condemnor cannot be compelled to provide one rather than the other.

If the doctrine of substituted compensation is to be extended by analogy, the rationale underlying that doctrine must be examined. As above stated, perhaps the only expression of that rationale is the excerpt quoted heretofore from Chief Justice Taft's opinion in the case of *U. S. v. Brown, supra.*

> "A method of compensation by substitution would seem to be the best means of making the parties whole."

If the rationale of the rule is making the parties whole again, that is to say, restoring the *status quo* so far as that is possible, then the new doctrine of compensation by deprivation cannot claim the support of a supposed analogy. For compensation by deprivation means compensating the the landowner, not by restoring the status quo, but by taking away from him more than is needed or justified.[21] This is the very antithesis of restoration of the *status quo*. It means the creation of an entirely new situation, and, obviously, finds no support in the procedure followed in the case of *Brown v. U. S.*

In *Dohany v. Rogers*, 281 U. S. 362,[21] the Highway Commission of Michigan, in reconstructing and widening a road, adjoining for several miles a railroad right-of-way, contracted to acquire the right-of-way, in exchange for certain other lands, sought to be condemned for relocation of the railroad. The appellant, whose lands were sought, brought suit to enjoin the condemnation thereof. It will be observed at once that the facts here are comparable to those in the *Brown* case, *supra*, and even more analogous to those in the *Foltz* case, *supra*. In each of those three cases, the method followed was what Chief Justice Taft, in the *Brown* case, characterized as "substituted compen-

[21] Relied upon on Page 30, Petitioner's Brief.

sation", which is exactly the procedure, we respectfully submit, that should now be followed in the instant case.

If, in the present proceeding, as occurred in *Feltz v. Central Nebraska Public Power Co.*, 124 F. (2) 578, (C. C. A. 8—1942), and in so many other similar situations since *Brown* v. *U. S.* (See R. 61), the condemning agency were seeking to acquire lands of the respondents for a right-of-way to replace 288, we would certainly not be here objecting. Such a method would, if followed now, enable TVA, at least for all practical purposes, to meet its remaining liability to North Carolina and to Swain County, and finally to these landowners, for the loss of 288. It will be relatively very inexpensive, because Respondents Burns and Welch have definitely waived their claim for any substitute highway or for damages; the damages suffered by the other respondents have been relatively small to date; and, finally, the cost of replacing 288 from the Nolands Creek Road to Bryson City (which will meet the needs of the remaining respondents and will fully satisfy them) will be almost negligible, comparatively speaking (R. 21, 209-210). Perhaps, in our discussion of the cases cited by Petitioner in support of its contention that the Court below exceeded its authority, in reviewing TVA's determination that Respondents' lands should be condemned, we have seemed to wander afield from the question whether the proposed taking here is for a "public use". Perhaps we should conclude our discussion on that subject with a quotation from the opinion in an early case, *Bloodgood* v. *Mohawk & H. River Co.*, 18 Wend. 9, 31 Am. Dec. 313, 356, cited with approval in *City of Richmond* v. *Carneal* (Supreme Court of App. of Va.), 129 Va. 388, 106 S. E. 403, also cited by the Court below herein (R. 131):

> "When we depart from the natural import of the term 'public use', and substitute for the simple idea

of a public possession and occupation, that of public utility, public interest, common benefit, general advantage, or convenience, or that still more indefinite term 'public improvement', is there any limitation which can be set to the exertion of legislative will in the appropriation of private property? The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us. * * *."

II

Nowhere in the Act nor among the precedents is there authority for TVA to condemn private properties for the use or purpose here proposed.

The first of what perhaps may be designated as our Adversary's *legal* contentions, in the order in which he has stated it, is that the Act confers upon the Petitioner "the full *constitutional power* of the Federal Government to condemn lands *for the purposes of the Act*".[22] (Emphasis ours.) Of course, no reference is made in Petitioner's brief to any specific provision of the Federal Constitution wherein the power of eminent domain is granted to TVA. In fact, as this Court well knows, the power to take private property for *public use* does not spring from the Constitution, but is said to be inherent in the sovereign.[23]

The only Federal Constitutional provisions which refer specifically to this power, place *limitations* upon it, viz. the

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[22] Petitioner's Brief 11 (in I of Summary), 12 (in II of Summary), and in bold type on 16.

[23] 18 Amer. Jur. 635, citing *Georgia* v. *Chattanooga*, 264 U. S. 472, 480; *Kohl* v. *U. S.*, 91 U. S. 367, 373; and scores of other cases there cited; also *In re Wanisimmet Co.* (Supr. Jud. Ct. of Mass.—1911), 209 Mass. 1, 95 N. E. 293.

Fifth Amendment, prohibiting the taking without just compensation, and the Fourteenth Amendment, prohibiting the States from taking without due process of law. Doubtless, it is proper to say, as have the Courts at times, that those limiting provisions impliedly recognize the existence of the power of eminent domain in the governments, Federal and State. However, it scarcely seems accurate to refer to TVA's power of eminent domain as "the full *Constitutional* power of the Federal Government", unless perhaps the Constitutional limitations are intended to be emphasized here—and we believe that to be unlikely.

As was seen in the case of *City of Cincinnati* v. *Vester*, *supra*, p. 17, occasionally, at least, State Constitutions contain express grants of the power of eminent domain to municipalities;[24] but, of course, there is no corresponding Federal Constitutional provision conferring that power upon TVA.

We have directed the Court's attention to the source or basis of eminent domain, not to be specious or facetious with our Adversary, but in an effort to approach the question of TVA's power here from a background which furnishes an accurate setting.

It has been said that the power of eminent domain rests entirely with the legislature and lies dormant until the legislature sets it in motion. In *18 Amer. Jur. 637*, we find this statement, which appears to be amply supported:

> "Under the customary division of governmental power into three branches, executive, legislative and judicial, the right to authorize the exercise of the power is wholly legislative and there can be no taking of private property for public use against the will of

[24] In *City of Cincinnati* v. *Vester*, *supra*, p. 18, 281 U. S. 439, at 441, there is quoted such a provision in the Constitution of Ohio.

the owner without *direct* authority from the legislature." (Emphasis supplied.)

All of the sections of the Act deemed to be pertinent in this proceeding are contained in the Appendix hereto.[25]

The opening sentence of the Act (Title 16 U. S. C. A. Sec. 831) states the *general* purpose of the creation of TVA to be:

1. To maintain and operate properties in the vicinity of Muscle Shoals "in the interest of the National defense and for agricultural and industrial development."

2. To improve navigation in the Tennessee River.

3. To control destructive flood waters in the Tennessee River and Mississippi River basins.[26]

TVA's power of eminent domain is granted in Section 4(h) of the Act (Title 16, U. S. C. A., Sec. 831c(h)), as follows:

"(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act."

Section 4(i) of the Act (Title 16 U. S. C. A., Sec. 831c(i)) authorizes TVA "to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses and other structures, and navigation projects" and "to condemn all property that it deems necessary *for carrying out the purposes of this Chapter.*" (Emphasis supplied.[27]

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[25] See also R. 65-95 for full text of Act.

[26] See Appendix hereto, page 53, *infra*, for full text of this section.

[27] See Appendix, page 53, *infra*, for full text of Section 4(i).

Section 25 of the Act (Title 16, U. S. C. A., Sec 831x) provides that TVA "may cause proceedings to be instituted for the acquisition by condemnation of any lands, easements or rights of way which in the opinion of the Corporation, are necessary to carry out the provisions of this Act."[28]

Finally, Section 31 of the Act, an amendment in 1935 (Title 16, U. S. C. A., Sec 831dd, found at Page 600 of Title 16, U. S. C. A.), added the following provisions:

> "Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: PROVIDED, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in Section 4(k) of this Act."

The sections paraphrased and quoted above are those chiefly relied upon by Petitioner for its authority to condemn Respondents' lands.

Although the Petitioner asserts that it has "the full constitutional power of the Federal Government to condemn lands for the purposes of the Act," we assume that it claims no powers beyond those granted to it in the Act. In the condemnation petitions herein (Par. 5), it is alleged:

> "That pursuant to the authority contained in the Tennessee Valley Authority Act, a dam, said dam being

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[28] See Appendix, Pages 56 and 57, *infra*, for full text of Sec. 25.

known as Fontana Dam *for the purpose of promoting national defense, navigation, and the control of the flood waters of the Tennessee and Mississippi Rivers is being constructed* * * *." (Emphasis supplied.)

Paragraph 6 of each of those petitions contains this allegation:

"The corporation has caused surveys to be made of the said Fontana dam site, of the land which will be flooded as the result of the construction of Fontana Dam and of the other lands which the Corporation will need in connection *with the construction of Fontana Dam*, and the Corporation has determined that the property hereinafter described will be necessary for carrying out the purposes of the Tennessee Valley Authority Act." (Emphasis supplied.)

The Courts have uniformly held that, although consideration should be given to the *principal* purposes sought to be accomplished by a statute authorizing condemnation, such statute must be strictly construed, because "the power of eminent domain is more harsh and peremptory in its exercise and operation than any other."[29]

One leading text-writer on Eminent Dougain (*Nichols*, (2nd Ed.), Volume 2, pp. 987-989), has stated the rule thus:

"One of the most firmly established principles of the law of eminent domain is that the burden is on a party seeking to exercise the power to show an express warrant from the legislature. The power of eminent domain will never pass by implication, and even when the power has been expressly granted, the grant will be construed strictly against the grantee and he will not be allowed to take the lands of another unless he

[29] *1 Lewis, Eminent Domain* (3rd Ed.), p. 708, citing a long list of supporting decisions including *Mills* v. *St. Clair County*, 8 How. 569.

> comes clearly and unmistakably within the limits of his authority. On the other hand, while it is right that private property should be protected in every reasonable way, the exercise of eminent domain is not opposed to public policy, but is often essential to the public welfare, and a statute authorizing the exercise of the power, while it should be construed strictly, should be enforced in such a way as to effectuate the purpose for which it was enacted.

Perhaps at this point, at the expense of repetition, it should be stated that, in giving consideration to the purposes stated in the TVA Act, it must, of course, be borne in mind, as has already been seen, that the question, whether the *purpose* for which these lands are sought is one for which the Act authorizes condemnation, is a *judicial* question; and TVA's Board could not and did not preclude a determination of the question by the Courts, by passing a resolution declaring the Board's judgment on that question.

The sections of the Act set forth above relate the purposes for which TVA was created, viz. the operation of Muscle Shoals, Alabama, in the interest of national defense and for agricultural and industrial development, and to improve navigation and control the destructive flood waters in the Tennessee River and Mississippi River Basins. Those of the other sections paraphrased and quoted above, which grant to TVA the power to condemn lands expressly limit that power to the taking of such lands as are necessary "to accomplish the purposes of this Act", or, as stated in Section 4(i), "for carrying out the purposes of the Act." When the section reciting the purposes for which TVA was created and the sections authorizing condemnation of property for those purposes, are read together, it will, we are confident, be as crystal clear to this Court, as it was to each of the Courts below that the pur-

pose for which these Respondents' lands are sought is *not* one for which the Act, either expressly or by "necessary implication", authorizes condemnation.

But, we are referred by Petitioner to other sections of the Act and to the "legislative history" of Section 31.[30]

The first of those sections to which our attention is called is 4(1), a part of the Amendment of 1935. It reads as follows:

> "(1) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of lands, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end (49 Stat. 1080)."

The only situation among those mentioned in Section 4(1) (above) that even remotely approaches the instant one is "readjustment of the population displaced by the * * * acquisition of rights-of-way * * *." Surely that provision was intended only to authorize TVA, as the language states, to "advise and cooperate" in the readjustment of the population, if they be rendered homeless by the taking of their residences by TVA, in the acquisition of rights-of-way—obviously not true of these Respondents here, and certainly not if the accepted method of "compensation by substitution" be followed. The construction of the necessary substitute road here would not "displace the population" of the lands here, but would serve them.

The next section of the Act relied upon by Petitioner is the portion of Section 4(k),[31] which authorizes TVA to

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[30] Petitioner's Brief, Pp. 18-21.

[31] See Appendix hereto, Page 54, *infra*, for full text of Section 4(k).

dispose of real estate acquired by it, for "* * * the purpose of recreation or use as a summer residence, or for the operation of such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose; * * *," or for "* * * the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: Provided, That no transfer authorized herein in (b) shall be made without the approval of Congress; * * *."

Surely, Petitioner can find no support in the above section for its claim of the right to condemn a large area beyond that needed for any use in its project, but sought for the admitted purpose of conveying it to the National Park Service.

Particular emphasis is placed by Petitioner on Section 31 of the Act, also a part of the Amendment of 1935. Perhaps, therefore, the full text of that section should be quoted here:

> "Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: Provided, That any land *purchased* by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act." (Emphasis supplied.)

Petitioner contends that the "legislative history" of Section 31 shows that Congress, in that section, intended to grant to TVA, the power to *condemn* such areas as the 44,000 acres, and for the *use* proposed to be made of that area. Reference is then made specifically to the Majority Report, to the Minority Report of the House Committee on Military Affairs, and to a portion of Section 31, as ultimately enacted.

Petitioner points out that the Majority Report recommended the enactment of a provision prohibiting the acquisition or holding of more real estate than "necessary to carry out its plans and projects actually decided upon requiring the use of such real estate."[32] The reasons advanced by the Majority were that the TVA should not "go into the real-estate business," and that "The *buying* and selling of real estate not actually necessary for carrying out actual plans of navigation and flood-control would have no proper logical or legal relation to regulating interstate commerce." (Emphasis supplied.) Finally, the Majority stated:

> "* * * The *buying* and selling of land not necessary for developing navigation, and having no proper logical and legal connection therewith cannot be constitutionally authorized nor constitutionally exercised. *Any lands actually needed can be acquired by eminent domain.*" (Emphasis supplied.)

Petitioner points out that two of the Representatives on the Committee, in their Minority Report, stated:

> "* * * in some sections in the reservoir areas, *little peninsulas of land* are necessarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has

[32] The complete statement of the Committee's Majority on this subject is quoted on Pages 57 to 59, *infra*, of Appendix hereto.

> been found much cheaper to *buy up* the land in peninsulas than to construct new roads along the steep mountain sides * * * to prohibit the acquisition of *such lands*, obviously, would greatly increase the cost of the project." (Emphasis supplied.)

In connection with their comments on the Norris, Wheeler and Pickwick reservoirs, those Members of the Committee also stated:

> "* * * A program of soil protection and forestation *essential to the protection of the reservoirs* is being developed for these lands, but cannot wisely be adopted until further work has been done on it. These lands were not *purchased* haphazardly. * * *" (Emphasis supplied.)

In quoting from the Reports of the Committee and from the text of the Amendment as enacted (Sec. 31), we have attempted to emphasize, by the use of italics, the fact that both the Minority and the Majority of the Committee, in considering the proposed prohibition against the *acquisition of any land whatsoever* beyond that to be included or used within the projects of TVA, clearly had in mind only the possibility of TVA's *purchasing—not condemning*—such small areas as "little peninsulas of land * * * necessarily isolated." It will be readily observed that the Majority Report contained the very definite and lucid statement that "Any lands actually needed can be acquired by eminent domain."

Moreover, the Amendment (Sec. 31) as enacted, provides for a liberal construction of the Act—not in order to permit TVA to *condemn* enormous areas, neither needed nor sought for use in its projects—but merely "* * * to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting *Government properties entrusted to the Author-*

ity * * *." The Amendment also directs that, "* * * Provided, That any land *purchased* by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act." (Emphasis supplied.) Again, it will be observed that the Amendment itself refers only to land "*purchased*." Surely this legislative history contains nothing to abrogate the settled principles universally applied in the construction of statutes authorizing condemnation of private property. On the contrary, at least as we see it, the most that can be said here is that Congress, in Section 31, rather reluctantly acquiesced in the *purchase*—but clearly not in the condemnation—of even "little peninsulas of land * * * necessarily isolated," "* * * essential to the protection of reservoirs" or perhaps necessarily purchased to avoid foolish impracticalities.

Certainly, only a very strained construction of Section 31 of the Act would enable Petitioner to find therein authority for condemnation of an area of the magnitude here proposed for the purpose for which these lands would be used if condemned. *Lewis on Eminent Domain* (3rd Ed.), Volume 1, Page 679, in speaking of statutes authorizing the taking of private property for public use, clearly sets forth the rule which seems to be controlling here:

> "371 (240). THE AUTHORITY TO CONDEMN MUST BE EXPRESSLY GIVEN OR NECESSARILY IMPLIED. The exercise of the power being against common right, it cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out by argument and inference, it does not exist. 'There must be no effort to prove the existence of such high corporate right, else it is in doubt;

> and, if so, the State has not granted it.' If the act is silent on the subject, and the powers given by it can be exercised without resort to condemnation, it is presumed that the legislature intended that the necessary property should be *acquired by contract*." (Emphasis supplied.)

The Author of the above-quoted text cites a decision in which "commissioners were empowered to select a site for a city hall, either certain lands owned by the city or any other lands, and to cause a city hall to be erected thereon, it was held by the Court of Appeals of New York, that, in case land not owned by the city had been selected, there would have been no power to condemn, and, if the commissioners *could not have agreed with the owner*, they could have proceeded no further in the matter.[33]

> "* * * That government can scarcely be deemed to be free where the rights of property are left solely dependent upon the will of a legislative body without any restraint. The fundamental maxims of a free government seem to require that the rights of personal liberty and *private property should be held sacred*. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expression of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention." (Emphasis supplied.)

Petitioner cites *United States* v. *Meyer*, 113 F. (2) 387 (C. C. A. 7), cert. denied 311 U. S. 706, as authority for the "excess condemnation" sought here. In fact, that

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[33] *People ex rel. Hayden* v. *City of Rochester*, 50 N. Y. 525.

case is cited in six places in Petitioner's Brief. Perhaps, therefore, we should recite here the facts in that case and the bases for the decision.

The case involved the Rivers and Harbors Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. § 591, which authorizes the Secretary of War to acquire by condemnation any land needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors, for which provision has been made by law. The Secretary of War sought to condemn the fee to the lands of the defendants. They resisted, contending that the Secretary's action was not characterized by good faith but constituted an abuse of his discretion, for the reason that a title in fee simple was not necessary for the accomplishment of the purpose of the project. Defendants offered in evidence a letter from the Chief of Engineers of the War Department to a Senator, in which—to use the language of the Seventh Circuit Court of Appeals—"the writer indicated that in the pools of the lower reaches of the improvement, some of the lands to be acquired would no doubt be desired for development of parks and recreational facilities and stated that the land would be permanently *under water, and that in the interest of the users of the resulting pools for navigation, recreation and police of their shores, it was considered desirable for the Federal Government to obtain, more than a flowage easement and that, therefore, a fee simple title should be acquired.*" (Emphasis supplied.) The factual bases for the decision of the Circuit Court of Appeals in the *Meyer* case are stated in its opinion as follows (113 F. (2) at p. 392):

> "It should be observed first that the letter was incompetent as evidence, for the reason that it was not written by the official who had the burden of determining the question of necessity but by a subordinate agent with whom the Secretary may or may not have agreed.

> The opinions of such third persons are of no avail to impeach the integrity of the responsible official. Moreover, nothing in this document impeaches the original purpose, namely, betterment of navigation and flood control. Old Dominion Land Co. v. United States, 4 Cir., 296 F. 20, affirmed 269 U. S. 55, 46 S. Ct. 39, 70 L. Ed. 162. The evidence in the record, including that tendered by defendants, tends to disclose only a difference in judgment as to the necessity of a fee simple title—nothing in the way of abuse of discretion. Furthermore, in their cross-complaint defendants averred that the possession of the Government 'would completely destroy' the lands 'by the operation of the dam'. If there was a complete taking or destruction of defendants' property, it would seem obvious that a fee simple title was requisite."

As will be seen from the above extract from the opinion in the *Meyer* case, the Circuit Court found that no persuasive evidence had been produced to show that the lands sought to be condemned, were actually unnecessary for the purposes of the Act, but actually it was found that they would be permanently under water as a result of the operation of the dam; and the Court found that no proof had been produced to show abuse of discretion by the Secretary of War.

In the case at bar, the findings of fact were exactly to the contrary of the finding in the *Meyer* case. Here, Petitioner needs none of the lands of the Respondents for any of the purposes expressly enumerated in the Act (R. 24-25, F. of F. 37). Judge Parker, for the Circuit Court of Appeals, stated this fact thus (150 F. (2) 616, 617, R. 126):

> "None of the 44,400 acre boundary, except two or three acres, as to which there is no contest, was needed by the TVA for the purpose of constructing the dam or reservoir. All lay above the high-water level of the reservoir; and it was not proposed to take stone

> or timber from it or use it in any other way for any of the purposes for which the TVA had been created. It was admittedly being taken to be conveyed to the Department of the Interior to be incorporated in the Great Smoky Mountains National Park, under a contract with the State of North Carolina and Swain County, as a means of extinguishing the liability of the TVA for flooding the highway."

The distinction between the instant case and the *Meyer* case must be apparent. There, according to the only competent evidence produced, and under the findings of fact, the lands in question were flooded to the point of "destruction", and the flooded portions had been determined to be actually necessary for "navigation and police of their shores." Contrast that factual situation with the situation now before the Court, and the reason for the difference between the decisions of the Circuit Courts in the two cases, respectively, is readily understood.

U. S. v. *Meyer*, as is contended by the Petitioner, is authority for the proposition that if the use or purpose for which land is sought is a "public use" (one authorized by the statute in question), a legislative agency may determine whether the fee or merely an easement shall be condemned, and that such a determination is not subject to judicial review. The following cases, cited in Petitioner's Brief,[34] are likewise authority for the same proposition of law: *U. S.* v. *Great Falls Mfg. Co.*, 112 U. S. 645; *Mills* v. *United States*, 46 Fed. 738; *U. S.* v. *Lynah*, 188 U. S. 445; *Hurley* v. *Kincaid*, 285 U. S. 95.

The following cases are cited by Petitioner in its Brief[35] in support of a somewhat similar theory (the so-called theory of "remnant lots" which we have seen was unsuccess-

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[34] Petitioner's Brief 33 and 34.

[35] Petitioner's Brief 34.

fully advanced in *Cincinnati* v. *Vester*, *supra*, Page 20, in an effort to justify the taking of lots of land not actually needed for the project proper, but sought to be condemned because of an alleged connection therewith, found to be too remote): *Armstrong* v. *City of Detroit*, 286 Mich. 277; *Emmons* v. *City of Detroit*, 261 Mich. 455, Aff'd. 255 Mich. 558; *City of Chicago* v. *McCluer*, 339 Ill. 610. We have no quarrel with the principle announced in those cases. But, surely, the Petitioner does not contend that the 44,000-acre area in this case constitutes a "remnant lot".

In concluding our comments on the Petitioner's contention that the flooding of the highway (the taking of the easement) of itself justifies the taking of the fee, perhaps we should revert again to the facts in the instant case, very briefly. We are sure that the Court has clearly in mind the facts with respect to the area actually flooded or expected so to be when the water in the Reservoir is at its highest. We understand that no portion of Highway 288 has been flooded to date at any point easterly from Hickory Flat Branch, which, with a microscope, may be seen on Petitioner's Exhibit 3 (the map following R. 145). Hickory Flat Branch lies a short distance easterly from Nolands Creek. We understand further that the lands which are expected to be flooded by the Reservoir when it is at its highest are shown on the aforementioned map in light blue, and are immediately adjacent to, and follow the banks of the Little Tennessee River and the Tuckasegee River. It is unfortunate that the Map does not show Highway 288. There appears to be nothing on it even to indicate the former location of that road. However, no more than a glance at the Map is necessary, we believe, to show very clearly that the flooding of the Reservoir basin does not destroy the properties of the Respondents located miles therefrom, in any such sense as the landowners' property

was taken and destroyed in the *Meyer* case, or in any of the others relied upon, in this regard, by the Petitioner. Furthermore, if the Court should hold that the mere taking of a road or highway, which serves a particular community or rural section, will in and of itself authorize and empower, or will carry with it the further authority to the condemning body to appropriate all of the lands and all of the properties served by that highway, absolutely irrespective of the use sought to be made thereof, it seems to us that very little imagination is required to realize the dangerous lengths to which any such theory would lead us.

In the forepart of Petitioner's Brief, the contention is made, or the impression is certainly conveyed that TVA contends one of the merits of its proposal to be the saving of great expense. We hope that we have shown, by reference to the testimony of Petitioner's witnesses—and the Court below found (R. 132)—not only that no saving would be accomplished through Petitioner's plan, but that enormously greater expenditures by the Federal Government would be involved therein. On Page 36 of its Brief, evidently in order to avoid the force of the decisions holding that "excess taking" is not justifiable even in the interest of economy, Petitioner makes this statement:

> "The Tennessee Valley Authority is not here seeking to profit from the sale of the lands sought to be acquired or to recoup any part of the cost of the Fontana project."

To put it somewhat bluntly, our reply to the above statement must be, either that our Adversary was not serious in his contention that the alleged economy would justify his plan, or that, in making the above statement, he is quibbling. *Of course*, TVA is not seeking here to take lands for resale at a profit. Nobody has made any such accusation. How-

ever, can it be gainsaid that in the forepart of its Brief, Petitioner argues that its plan will reduce the cost of the Fontana project? In principle, what difference is there between recouping costs and saving expense, as applied to such a situation as that here before us?

We are unable to summarize the rule, that "excess taking" cannot be justified by an economy plea, any more clearly than was done by Judge Parker in his opinion below, as follows (R. 130-131):

> "What the TVA is proposing to do here cannot be distinguished in principle from what was condemned by the Supreme Court of Appeals of Virginia in the Carneal case, supra" (meaning *Richmond v. Carneal*, (Supreme Court of Appl. of Va.), 129 Va. 388, 106 S. E. 403, 14 A.L.R. 1341, and note at 1350) "where Mr. Justice Burks, in a noteworthy opinion, reviews the law and the decisions bearing on the matter. In that case the City of Richmond attempted to take portions of city blocks through which a new boulevard ran, although they were not needed for the boulevard itself. The attempted justification for this excess taking was that, by replatting the lots and readjusting their lines and presumably, selling them to others, the expense of the improvement could be reduced. In City of Cincinnati v. Vester, supra, the Circuit Court of Appeals of the Sixth Circuit condemned an excess taking for a similar purpose. Certainly the condemnation of land to be used in satisfying the state's claim of damages for the flooding of the road cannot be distinguished in principle from these cases which involved the taking of lands to be used in mitigating damages due to the opening or widening of streets. If the TVA, for the purpose of settling a claim for damages, can take land which it does not need for the public project in which it is engaged, no reason suggests itself why the land could not be taken and sold for the purpose of raising funds to satisfy the claim. The right of private property cannot be flouted in this way."

Judge Parker's opinion then proceeds with a quotation from *Bloodgood* v. *Mohawk & H. River R. Co.*, *supra*, page 39.

Conclusion

The sociological problems which might have been involved if TVA had not provided a substitute highway for any part of the 44,000-acre area, we submit, are, certainly at this point, purely of academic interest. To some, such problems may still seem to be such as concern primarily the State and the County. Whatever may be the proper view about that, as a practical proposition the Court is not concerned with it. We do not want to be understood to suggest that this Court must ignore any practicalities that may be involved, particularly any that are inherent in the situation in the instant proceeding. Consequently, in closing, perhaps we should suggest briefly—and we will do so in all humility and with the realization that primarily this may be considered to be TVA's "affair"—a practical solution of the problem, that may be posed, with respect to the lands owned by the Respondents and to the inhabitants thereof.

The Dam and the Reservoir have long since been completed. The 38,000 acres westerly from Nolands Creek have actually been excluded from this proceeding. The War, for most practical purposes at least, has finally ended. All of the Respondents are in actual occupation of their properties, and most of them now live there continuously. They now have access, of a fashion, to their properties. Concededly, however, a road, for a distance of about six to eight miles, perhaps similar in character (gravel) to Highway 288, is needed, near where the extreme easterly end of 288 was formerly located. The expense of acquiring the right-of-way there, and of constructing such a road, would be comparatively little. TVA has substantially complied, at least to the extent legally possible, to its obligations

under the 4-party Contract. Neither the State nor the County can properly complain if a short road should be substituted. No material damage will have been done to either the State or the County, because, as the representatives of the State testified (R. 52,-57), Highway 288 was of practically no actual value as a connecting link in North Carolina highways, nor as a "through-road."

Interested though this Court may be in any practical problems that may now concern TVA in this situation, we must assume that the issues here must actually be determined on the basis of legal principles.

Hereinabove, attention has been called to certain fundamental principles of law relating to the exercise of the power of eminent domain. They may be briefly summarized thus: the Doctrine of "public use"; the rule that the burden rests squarely upon a condemnor to show clear authority for a proposed taking; the principle that statutes authorizing condemnation must be strictly construed, and that all doubts are to be resolved against the alleged power to condemn; and the rule against "excess taking", even to accomplish economies.

Concededly, Respondents' lands are not sought for any purpose for which condemnation is expressly authorized by the Act. Authority for such taking cannot be said to be necessarily implied from anything contained in the Act. The use to be made of Respondents' land, if condemned, is entirely too remote, we submit, to be sanctioned by this Court under the law.

We urge that the judgment of the Court below be affirmed.

Respectfully submitted,

G. L. Jones,
George H. Ward,
Attorneys for all Respondents
Other Than S. Columbus Welch.

APPENDIX

The following include the sections of the T. V. A. Act which both sides agree to be pertinent in this proceeding, and those alleged by either the Petitioner or the Respondents to be pertinent:

Opening Sentence of Act (Title 16 U. S. C. A., Sec. 831)—

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the 'Tennessee Valley Authority' (hereinafter referred to as the 'Corporation')."

Powers of T. V. A.

Section 4(h) (Title 16, 831c(h)):

"(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act."

Section 4(i) (Title 16, 831 c(i));

"(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, powerhouses, and other structures, and navigation

projects at any point along the Tennessee River, or any of its tributaries, and in the event "that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain, and to condemn all property that it deems necessary for carrying out the purposes of this Act, and all such condemnation proceedings shall be had pursuant to the provisions and requirements hereinafter specified, with reference to any and all condemnation proceedings (48 Stat. 60-61): PROVIDED, That nothing contained herein or elsewhere in this Act shall be construed to deprive the Corporation of the rights conferred by the Act of February 26, 1931 (46 Stat. 1422, ch. 307, secs. 1 to 5, inclusive), as now compiled in section 258a to 258e, inclusive, of Title 40 of the United States Code. (49 Stat. 1075.)"

Section 4(k) (Title 16, 831 c(k) (a-d)):

"(k) Shall have power in the name of the United States—

(a) to convey by deed, lease, or otherwise, any real property in the possession of or under the control of the Corporation to any person or persons, for the purpose of recreation or use as a summer residence, or for the operation on such premises of pleasure resorts for boating, fishing, bathing, or any similar purpose;

(b) to convey by deed, lease, or otherwise, the possession and control of any such real property to any corporation, partnership, person, or persons for the purpose of erecting thereon docks and buildings for shipping purposes or the manufacture or storage thereon of products for the purpose of trading or shipping in transportation: PROVIDED, That no transfer authorized herein in (b) shall be made without the approval of Congress; AND PROVIDED FURTHER, That said corporation, without further action of Congress, shall have power to convey by deed, lease, or

otherwise, to the Ingall Shipbuilding Corporation, a tract or tracts of land at or near Decatur, Alabama, and to the Commercial Barge Lines, Inc., a tract or tracts of land at or near Guntersville, Alabama;

"(c) to transfer any part of the possession and control of the real estate now in possession of and under the control of said Corporation to any other department, agency, or instrumentality of the United States: PROVIDED, HOWEVER, That no land shall be conveyed, leased, or transferred, upon which there is located any permanent dam, hydroelectric power plant, or munitions plant heretofore or hereafter built by or for the United States or for the Authority except that this prohibition shall not apply to the transfer of Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, or to Waco Quarry: AND PROVIDED FURTHER, That no transfer authorized herein in (a) or (c), except leases for terms of less than twenty years, shall be made without the approval of the President of the United States, if the property to be conveyed exceeds $500 in value; and

(d) to convey by warranty deed, or otherwise, lands, easements, and rights-of-way to States, counties, municipalities, school districts, railroad companies, telephone, telegraph, water, and power companies, where any such conveyance is necessary in order to replace any such lands, easements, or rights-of-way to be flooded or destroyed as the result of the construction of any dam or reservoir now under construction by the Corporation, or subsequently authorized by Congress, and easements and rights-of-way upon which are located transmission or distribution lines. The Corporation shall also have power to convey or lease Nitrate Plant Numbered 1, at Muscle Shoals, Alabama, and Waco Quarry, with the approval of the War Department and the President."

Section 4(l) (Title 16, 831c(l)):

"(1) Shall have power to advise and cooperate in the readjustment of the population displaced by the

construction of dams, the acquisition of reservoir areas the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end. (49 Stat. 1080.)"

Section 18 (Title 16, 831q):

"Sec. 18. In order to enable and empower the Secretary of War, the Secretary of the Interior, or the board to carry out the authority hereby conferred, in the most economical and efficient manner, he or it is hereby authorized and empowered in the exercise of the powers of national defense in aid of navigation, and in the control of the flood waters of the Tennessee and Mississippi Rivers, constituting channels of interstate commerce, to exercise the right of eminent domain for all purposes of this Act, and to condemn all lands, easements, rights of way, and other area necessary in order to obtain a site for said Cove Creek Dam, and the flowage rights for the reservoir of water above said dam, and to negotiate and conclude contracts with States, counties, municipalities, and all State agencies and with railroads, railroad corporations, common carriers, and all public utility commissions and any other person, firm, or corporation, for the relocation of railroad tracks, highways, highway bridges, mills, ferries, electric-light plants, and any and all other properties, enterprises, and projects whose removal may be necessary in order to carry out the provisions of this Act. When said Cove Creek Dam transmission line, and power house shall have been completed, the possession, use, and control thereof shall be intrusted to the Corporation for use and operation in connection with the general Tennessee Valley project, and to promote flood control and navigation in the Tennessee River."

Section 25 (Title 16, 831x):

"Section 25. The Corporation may cause proceedings to be instituted for the acquisition by condemnation

of any lands, easements, or rights of way which, in the opinion of the Corporation, are necessary to carry out the provisions of this Act. The proceedings shall be instituted in the United States district court for the district in which the land, easement, right of way, or other interest, or any part thereof, is located, and such court shall have full jurisdiction to divest the complete title to the property sought to be acquired out of all persons or claimants and vest the same in the United States in fee simple, and to enter a decree quieting the title thereto in the United States of America. • • • "

Section 31:

"Sec. 31. This Act shall be liberally construed to carry out the purposes of Congress to provide for the disposition of and make needful rules and regulations respecting Government properties entrusted to the Authority, provide for the national defense, improve navigation, control destructive floods, and promote interstate commerce and the general welfare, but no real estate shall be held except what is necessary in the opinion of the Board to carry out plans and projects actually decided upon requiring the use of such land: PROVIDED, That any land purchased by the Authority and not necessary to carry out plans and projects actually decided upon shall be sold by the Authority as agent of the United States, after due advertisement, at public auction to the highest bidder, or at private sale as provided in section 4(k) of this Act."

Report of Majority of House of Representatives Committee on Military Affairs, Re. Section 31 of Act:

"The vital and controversial part of this section will be found in the latter part thereof stipulating that no real estate shall be acquired or held by the Authority except what is necessary to carry out its plans and projects actually decided upon requiring the use of such real estate. There is a proviso also that any land that has been purchased by the Authority

and whose ownership is not necessary to carry out the plans and projects of the Authority actually decided upon, then that such land shall be sold by the Authority as the agent of the United States, after due advertisement, at public auction to the highest bidder. It is manifest that the Authority should not go into the real-estate business. The buying and selling of real estate not actually necessary for carrying out actual plans of navigation and flood control would have no proper logical or legal relation to regulating interstate commerce.

Therefore, section 11 should and will be construed in connection with section 3 of this bill. Any lands that the Authority has and does not need for such actual development should be sold, and all property of the United States should be sold, only after "due advertisement at public auction to the highest bidder for cash. The Government cannot afford to play favorites among any of its citizens. The buying and selling of land not necessary for developing navigation, and having no proper logical and legal connection therewith cannot be constitutionally authorized nor constitutionally exercised. Any lands actually needed can be acquired by eminent domain."

Supplemental Views of Mr. Kvale and Mr. Maverick on H. R. 8632 (Minority Report):

"The actual provisions of this section, as reported by your committee, prohibit the purchase of any land not 'actually necessary to carry out plans and projects actually decided upon requiring the use of such lands.' It also requires the Authority to sell immediately any land which it has already acquired and which it does not need for carrying out plans 'actually decided upon'.

In the development of the Norris, Wheeler, and Pickwick Reservoirs, it has been necessary and economical to buy areas outside the water line. A program of soil protection and forestation essential to the protection of the reservoirs is being developed for these lands, but cannot wisely be adopted until further work has

been done on it. These lands were not purchased haphazardly. It was efficient and economical to acquire them at the same time that the Corporation's other land acquisition was accomplished.

For example, in some sections in the reservoir areas, little peninsulas of land are necessarily isolated. The reservoir waters will flood out the old valley roads which formerly gave access to these sections. It has been found much cheaper to buy up the lands in peninsulas than to construct new roads along the steep mountain sides.

To require the immediate sale of such lands, pending completion of final plans for their use, would constitute a great waste and great financial loss to the United States; and to prohibit the acquisition of such lands, obviously, would greatly increase the cost of the project."

SUPREME COURT OF THE UNITED STATES.

Nos. 528, 529, 530, 531, 532, 533.—October Term, 1945.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
528 *vs.*
S. Columbus Welch.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
529 *vs.*
John Burns, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
530 *vs.*
Fred Lollis, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
531 *vs.*
Arnold E. Bradshaw, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
532 *vs.*
Philip G. Rust, et al.

The United States of America, *ex rel.* Tennessee Valley Authority, Petitioner,
533 *vs.*
Abraham Cole Hyatt, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The United States, on behalf of the Tennessee Valley Authority, filed petitions in the District Court to condemn six tracts of land located in North Carolina and owned by the several respondents. It asserted that the power to condemn the land in question was conferred upon the Authority by the provisions of the Tennessee Valley Authority Act as amended, 48 Stat. 58 as amended, 16 U. S. C. 831-831 dd. The District Court held that the Act did not authorize condemnations under the facts shown by the evidence and dismissed the petitions. The Circuit Court of Appeals af-

firmed. 150 F. 2d 613. Since the grant of power to condemn needed properties is an essential part of the Act, we granted certiorari.

The following basic facts form the background of this proceeding: Congress in 1942 in order to meet pressing power needs for war production empowered the Authority to construct Fontana Dam, on the Little Tennessee River in North Carolina. H. Rep. 1470; 77th Cong. 1st Sess. 25. The dam is one of the world's largest and creates a reservoir twenty-nine miles long. [illegible] this reservoir and the Great Smoky Mountains National Park [illegible] forty-four thousand acres of mountainous land, including the [illegible] which the government wants to condemn here. When [illegible] authorized construction of the dam, two hundred and six families occupied this area. Their only convenient means of [illegible] and egress, except for foot trails, was North Carolina Highway No. 288, a road approximately fifty miles in length. When the dam was built the reservoir flooded nine of the highway, rendering it useless for travel. As a result, the area remained practically isolated.

As events have shown, the problem this situation created could not be easily solved. Any solution had to take into consideration the interests of the United States, of North Carolina, and of Swain County, N. C., as well as the interests of the individuals affected. The United States' interest was that of the T. V. A. and the National Park Service. The T. V. A. had a dual interest. First, the isolated area, while not actually submerged by the reservoir, was a part of the watershed. Left in private hands it could be used to frustrate some of the objectives of T. V. A. legislation. Second, the fact that the dam had caused the highway to be flooded created a serious problem for the inhabitants and property owners in the area who had been damaged by the project. It was the statutory duty of the T. V. A. to attempt to bring about proper adjustments in order to alleviate resulting hardship and inconvenience. At the same time, the T. V. A. was not supposed to waste the money of the United States. The United States' interest in the land through the National Park Service was due to the fact that this particular area had been included in the Great Smoky Mountains Park project. Had this land been actually owned by the United States for park purposes it would have been easier to subject it to servitudes in the interest of the T. V. A. development. North Carolina was interested in the land because it was its duty

to continue to hold and maintain a highway so long as its citizens continued to live within the area. Swain County had a similar interest. It had issued bonds to finance building the highway. Part of the bond issue was still outstanding.

Conferences between the interested groups brought to light facts which led to the solution ultimately adopted. It was agreed on all sides that the old road was narrow, dangerous, and far below modern standards for useful highways. Investigation showed that replacement of the old road with the same undesirable type of highway would cost about $1,400,000.00, while the cost of building an improved highway would greatly exceed that amount. All parties felt that the United States had neither a legal nor moral duty to build a new road of the superior type and quality needed. This meant that type of road could only be built if North Carolina would bear the additional expense. Since the highway carried no through traffic and serviced so few people, the state was not willing to pay for the added cost and all parties agreed that such an expenditure would be wasteful and unjustifiable. The War Production Board presented further obstacles. It was of the opinion that the road was not sufficiently essential to warrant use of the materials and manpower its construction would require. For these and other reasons North Carolina objected to the T. V. A.'s settling the controversy by a mere payment of damages to it for injury to the road and by the payment of damages to individual owners for destroying their access to the area. The State contended that this would leave the area in private hands with no adequate roads to serve the people and would impose unwise, if not impossible burdens, on the State and County in connection with providing schools, police protection, health services, and other necessary facilities.

After a year and a half of negotiations a solution was worked out. After the proposed solution was approved by the Governor, the Council of the State, and the Legislature of North Carolina, it was embodied in a settlement agreement between the State, the County, the National Park Service, and the T. V. A. Under that agreement the T. V. A. with the aid of a $100,000 contribution by the State was to acquire all the land in the isolated area, either by purchase or condemnation, so as to relieve the State from further responsibility for maintaining a highway to that section; Swain County was to be paid $400,000 by the Authority to help retire its outstanding road bonds; and the Authority was to transfer all

the area lands to the National Park Service for inclusion within the Great Smoky Mountains National Park but reserving to the T. V. A. all rights required to carry out the T. V. A. program. The agreement, thus, satisfied the interests of the state, the county, the T. V. A., and the National Park Service. The cost to the United States was several hundred thousand dollars less than the cost of rebuilding the old road. And all the landowners in the area, except these six respondents who refused to sell, have received full compensation for their property.

The Courts below have held that T. V. A. had no power under the Act to condemn the tracts of these respondents as contemplated by the agreement. The District Court reached this conclusion by limiting the Authority's power so that it can condemn only those lands which are needed for the dam and reservoir proper. It reasoned that the common law rule of construction requires that statutory powers to condemn be given a restrictive interpretation. But Section 31 of the Act expressly provides that the Act shall be "liberally construed to carry out the purposes of Congress to provide . . . for the national defense, improve navigation, control destructive floods and promote interstate commerce and the general welfare." In the face of this declaration, the District Court erred in following the asserted common law rule.

The Circuit Court of Appeals, without expressly relying on a compelling rule of construction that would give the restrictive scope to the T. V. A. Act given it by the district court, also interpreted the statute narrowly. It first analyzed the facts by segregating the total problem into distinct parts and, thus, came to the conclusion that T. V. A.'s purpose in condemning the land in question was only one to reduce its liability arising from the destruction of the highway. The Court held that use of the lands for that purpose is a "private" and not a "public use" or, at best, a "public use" not authorized by the statute. We are unable to agree with the reasoning and conclusion of the Circuit Court of Appeals.

We think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority. *United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 679. It is true that this Court did say in *Cincinnati* v. *Vester*, 281 U. S.

439, 446, that "It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn "excess" property on the ground that the state law had not authorized it. And in *Hairston* v. *Danville and Western Railway*, 208 U. S. 598, 607, this Court, referring to the "rule" later stated in the *Vester* case, said that "No case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the State Court as a taking for public uses in conformity with its laws." And see *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 257, 260-261. But whatever may be the scope of the judicial power to determine what is a "public use" in Fourteenth Amendment controversies, this Court has said that when Congress has spoken on this subject "Its decision is entitled to deference until it is shown to involve an impossibility." *Old Dominion Co.* v. *United States*, 269 U. S. 55, 56. Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields. See *Case* v. *Bowles*, decided February 4, 1946, slip opinion p. 6; *United States* v. *New York*, — U. S. —. We hold that the T. V. A. took the tracts here involved for a public purpose, if, as we think is the case, Congress authorized the Authority to acquire, hold, and use the lands to carry out the purposes of the T. V. A. Act.

In passing upon the authority of the T. V. A. we would do violence to fact were we to break one inseparable transaction into separate units. We view the entire transaction as a single integrated effort on the part of T. V. A. to carry on its Congressionally authorized functions. Cf. *United States* v. *Commodore Park*, 324 U. S. 386, 392. And we find not only that Congress authorized the Authority's action, but also that the T. V. A. has proceeded in complete accord with the Congressional policy embodied in the Act. That Act does far more than authorize the T. V. A. to build isolated dams. The broad responsibilities placed on the Authority relate to navigability, flood control, reforestation, marginal lands, and agricultural and industrial development of the whole Tennessee Valley. The T. V. A. was empowered to make contracts,

purchase and sell property deemed necessary or convenient in the transaction of its business, and to build dams, reservoirs, transmission lines, power houses, and other structures. It was particularly admonished to cooperate with other governmental agencies—federal, state, and local—specifically in relation to the problem of "readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisitions of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act." All of the Authority's actions in these respects were to be directed towards "development of the natural resources of the Tennessee River drainage basis and of such adjoining territory as may be related to or materially affected by the development consequent to this Act . . . all for the general purpose of fostering an orderly and proper physical, economic and social development of said areas." To discharge its responsibilities the T. V. A. was granted "such powers as may be necessary or appropriate" for their exercise. Section 4(h) of the Act gives the T. V. A. the very broad power to "exercise the right of eminent domain." Section 4 i of the Act empowers the Authority to condemn certain specified types of property and concludes by referring to "all property that it [the Authority] deems necessary for carrying out the purposes of this Act." To make clear beyond any doubt the T. V. A.'s broad power, Congress in Section 25 authorized the Authority to file proceedings, such as the ones before us, "for the acquisition by condemnation of any lands, easements, or rights of way which in the opinion of the corporation are necessary to carry out the provisions of this Act."

All of these provisions show a clear Congressional purpose to grant the Authority all the power needed to acquire lands by purchase or by condemnation which it deems necessary for carrying out the Act's purposes. These proceedings were preceded by a T. V. A. resolution that it did deem these acquisitions necessary for such purposes. Despite Congress' clear expression of its purpose to grant broad condemnation power to T. V. A. we are asked to hold that the Authority's power is less than the powers to condemn granted other governmental agencies, which under 40 U. S. C. 257 have been held to have a power to condemn coextensive with their power to purchase. *Hanson Company* v. *United States*, 261 U. S. 581, 587. Neither the fact that the authority

wanted to prevent a waste of government funds, nor that it intended to cooperate with the National Park Commission detracted from its power to condemn granted by the Act. The cost of public projects is a relevant element in all of them, and the government, just as anyone else, is not required to proceed oblivious to elements of cost. Cf. *Old Dominion Co.* v. *United States*, *supra*. And when serious problems are created by its public projects, the Government is not barred from making a common sense adjustment in the interest of all the public. *Brown* v. *United States*, 263 U. S. 78. Where public need requires acquisition of property, that need is not to be denied because of an individual's unwillingness to sell. *Kohl et al.* v. *United States*, 91 U. S. 367, 371. When the need arises individuals may be required to relinquish ownership of property so long as they are given that just compensation which the Constitution requires. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. Such compensation can be awarded these respondents by the District Court.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice REED, concurring.

I agree that the TVA has authority to condemn the tracts of land which the Authority seeks to acquire by these proceedings.

This authority flows from the power of eminent domain granted by sections 4 and 25 of the Tennessee Valley Authority Act, 48 Stat. 58, as amended. The grant which allows condemnation of all property that the Authority "deems necessary for carrying out the purposes of this Act," is in sufficiently broad terms, it seems to me, to justify these condemnations. When the Authority was faced with the problem of justly compensating the occupants of the forty-four thousand acre area between the Fontana Dam lake and the Great Smoky Mountains National Park, North Carolina and Swain County for the destruction of Highway No. 288, it could within its delegated powers purchase or condemn the lands affected or build a substitute highway whichever appeared cheaper. The United States is not barred from the exercise of good business judgment in its construction work. *Brown* v. *United States*, 263 U. S. 78. See *United States* v. *Meyer*, 113 F. 2d 387;

Old Dominion Land Co. v. *United States*, 296 F. 20, 269 U. S. 55, 66. Such action is not "outside land speculation." 263 U. S. at 84. It follows that having this power, the Authority could contract, as it did, to reduce its expenditures by the contract arrangements of July 30, 1943, with Swain County and North Carolina. With the Authority's power to turn over its lands to the National Park, we are not here concerned. Under the contract the public rights in Highway No. 288 were acquired by the Authority and it agreed to acquire the lands here in controversy. The acquisition of the whole area was a factor in these arrangements and the condemnation of these smaller tracts is a part of the transaction.

I do not join in the opinion of the Court because of certain language on slip opinion pages 4, 5 and 6 which implies to me that there is no judicial review of the Authority's determination that acquisition of these isolated pieces of private property is within the purposes of the TVA Act. The Court seems to accept the Authority's argument that a good faith determination by it that property is necessary for the purposes of the Act bars judicial review as to whether the proposed use will be within the statutory limits. This argument of lack of judicial power properly was rejected by the Circuit Court of Appeals although, as explained above, I think that court erroneously held that the TVA Act did not authorize these condemnations. 150 F. 2d 613, 616. It is my opinion that the TVA is a creature of its statute and found by the terms of that statute, and that its every act may be tested judicially, by any party with standing to do so, to determine whether it moves within the authority granted to it by Congress. *School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Social Security Board* v. *Nierotko*, No. 318, October Term 1945, decided February 25, 1946, slip opinion p. 8.

This taking is for a public purpose but whether it is or is not is a judicial question. Of course, the legislative or administrative determination has great weight but the constitutional doctrine of the Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizen. The former cases go no further than this. *United States* v. *Gettysburg Electric*

Ry., 160 U. S. 668, 680; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 709; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55, 66; *Cincinnati* v. *Vester*, 281 U. S. 439, 446.

Once it is admitted or judicially determined that a proposed condemnation is for a public purpose and within the statutory authority, a political or judicially non-reviewable question may emerge, to wit, the necessity or expediency of the condemnation of the particular property. These are the cases that led the TVA, erroneously in my view, to assert the action of its Board could "not be set aside by a court." *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349; *Bragg* v. *Weaver*, 251 U. S. 57, 58; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 708.

The CHIEF JUSTICE joins in this opinion.

Mr. Justice FRANKFURTER concurring.

I join in the opinion of the Court for I do not read it as does my brother REED. The Bill of Rights provides that private property shall not "be taken for public use without compensation." U. S. Const., Amend. V. This Court has never deviated from the view that under the Constitution a claim that a taking is not "for public use" is open for judicial consideration, ultimately by this Court. It is equally true that in the numerous cases in which the issue was adjudicated, this Court never found that the legislative determination that the use was "public" exceeded Constitutional bounds. But the fact that the nature of the subject matter gives the legislative determination nearly immunity from judicial review does not mean that the power to review is wanting. All the cases cited in the Court's opinion sustaining a taking recognize and accept the power of judicial review. I assume that in citing these cases the Court again recognizes the doctrine that whether a taking is for a public purpose is not a question beyond judicial competence.